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(14)

No. 08-987



In The
# Supreme Court of the United States

RUBEN CAMPA, a.k.a. John Doe 3, a.k.a. Vicky, a.k.a. Camilo, a.k.a. Oscar; RENE GONZALEZ, a.k.a. Iselin, a.k.a. Castor; GERARDO HERNANDEZ, a.k.a. Giro, a.k.a. Manuel Viramontez, a.k.a. John Doe 1, a.k.a. Manuel Viramontes; LUIS MEDINA, a.k.a. Oso, a.k.a. Johnny, a.k.a. Allan, a.k.a. John Doe 2; ANTONIO GUERRERO, a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of *Certiorari***
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## BRIEF *AMICUS CURIAE* OF NATIONAL JURY PROJECT IN SUPPORT OF PETITIONERS

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## IDENTIFICATION OF *AMICUS*

The National Jury Project is a Minnesota non-profit corporation originally established in New York in 1975 for the purpose of studying all aspects of the American jury system and maintaining and strengthening that system. The NJP maintains offices in Minnesota; California; New York and New Jersey providing consultative and educational services to attorneys, the courts, and social science professionals in criminal and civil litigation in federal and state courts throughout the United States.

The NJP has assisted attorneys in trial preparation and jury selection in thousands of civil and criminal trials involving a wide variety of issues. It has conducted surveys of public opinion concerning criminal justice issues and analyzed the content and impact of pretrial publicity in hundreds of cases. Based on this research NJP members have submitted declarations and affidavits in numerous cases on issues of venue, pretrial publicity, jury composition, survey research, jury selection procedure, the use of peremptory challenges and strike procedures. They have been qualified as expert witnesses in numerous federal and state courts.

The NJP has authored three texts, *Jurywork: Systematic Techniques* (2nd edition 1983, with annual updates through 2002); *Women's Self-Defense Cases: Theory and Practice* (1981); and *The Jury System: New Methods for Reducing Prejudice* (1975). Members of the NJP have written numerous articles for legal

and social science journals on subjects related to voir dire and the jury selection process. NJP members are frequent speakers at training seminars for judges and criminal and civil attorneys throughout the United States, including, *inter alia*, seminars conducted by the American Bar Association; National Association of Women Judges; Florida Conference of County Court Judges; State of New York Unified Court System Judicial Seminar; United States Department of Justice, Civil Rights Division; Practicing Law Institute; the American Trial Lawyers Association; Association of Business Trial Lawyers; California Attorneys for Criminal Justice; and National Association of Criminal Defense Lawyers.

NJP members have been invited to give testimony before Congressional committees and committees of numerous state legislatures.

NJP was cited with approval by Justice Thurgood Marshall, dissenting in *Mu' Min v. Commonwealth of Virginia*, 111 S. Ct. 1899 (1991), the California Supreme Court in *People v. Williams*, 29 Cal. 3d 392, 628 P.2d 869 (1981); and the Michigan Supreme Court in *People v. Tyburski*, 445 Mich. 606 at 623 (1994).

## INTEREST OF *AMICUS*[1]

Consistent with the express purposes for which it was founded, *amicus* has an ongoing interest in studying, maintaining and strengthening all aspects of the American jury system. From its members' studies of the relevant fields of social science and their extensive work and observation in individual cases, the NJP has developed a broad understanding of how the conditions under which jurors are selected, in conjunction with the communities from which they are chosen, affect the behavior of individual jurors and their ability to serve as fair and impartial arbiters of fact. The circumstances surrounding the choice of venue and jury selection in the present case involve issues of community bias which have implications for both the defendant and the jury system as a whole. For this reason, *amicus* has a strong interest in the outcome of this case.

## SUMMARY OF THE ARGUMENT

*Certiorari* is warranted to furnish guidance to trial courts across the country, federal and state, as to the circumstances under which a change of venue is

[1] No person other than *amicus* and its counsel participated in the writing of this brief or made a financial contribution to the brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief.

appropriate. Several basic aspects of the law are ambiguous and will continue to vex lower courts until this Court provides clarification.

There is a conflict among the circuits as to the burden of proof faced by the proponent of a Rule 21 based venue change for presumed prejudice. Three substantially different standards are in use and were applied in the instant case by the courts below.

Additionally, there is ambiguity in regard to the role played by the source of the bias in assessing the need for a venue change. Historically, requests for venue change have been prompted by excessive pre-trial publicity. Whether an equivalent need for a venue change can arise from community attitudes, which are distinct from the publicity a case has generated, is an as yet unresolved issue.

Lastly, trial courts must recognize the limitations of voir dire as a mechanism for detecting bias on the part of jurors. The unreliability of voir dire responses as a measure of juror bias has now been well documented by social science research. Until trial courts recognize this, they will rely too much on voir dire as an effective prophylactic device for insuring a fair trial and avoiding the need for a venue change.

## ARGUMENT

## *CERTIORARI* IS WARRANTED TO FURNISH GUIDANCE TO FEDERAL TRIAL COURTS ACROSS THE COUNTRY AS TO THE CIRCUMSTANCES UNDER WHICH A VENUE CHANGE IS APPROPRIATE

### I. THE BURDEN OF PROOF FOR A RULE 21 CHANGE OF VENUE BASED ON PRESUMED PREJUDICE IS IN NEED OF CLARIFICATION

This is a case in which the courts have to date imposed three substantially different standards as to the burden of proof defendants faced in their effort to have venue changed intra-district, from Miami to Fort Lauderdale, for presumed prejudice under Rule 21(a). The first is that adopted by the District Court below, which requires a level of bias which would render virtually impossible a fair trial (hereafter, the "virtual impossibility" standard). The second is the one adopted in the 11th Circuit *en banc* opinion below which requires a reasonable certainty that prejudice prevents the defendant from receiving a fair trial (the "reasonable certainty" standard). The third, adopted by the dissent to the *en banc* opinion, focuses on the probability or likelihood that a defendant cannot receive a fair and impartial trial (the "probability of unfairness" standard).

This conflict among standards echos that which exists between the federal circuits, as well as that which exists between the various state courts which

have addressed the issue of the constitutionally-mandated standard. It also echoes the uncertainty which *amicus* has encountered over the years on the part of trial courts across the country, federal and state, as to the appropriate burden of proof for venue change motions.

*Amicus* submits that the time is now ripe for a resolution of this conflict. With the revolution in technology which permits information to be disseminated more broadly and more rapidly than ever before, we are entering a period where there will be more rather than fewer requests for venue change. The 24 hour news cycle encompasses an endless chain of events. Amateur video footage of violent interactions between police officers and civilians, for example, like those that sparked civil unrest and ultimately led to the controversy about the appropriate venue in the Rodney King case, is becoming more commonplace.[2] The same applies to video footage of suspicious activity leading to an arrest, taken from a camera mounted on a police vehicle.

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[2] As this brief was being written, Oakland, California, was being rocked by street demonstrations protesting the killing – captured by bystanders with cell phone cameras and transmitted worldwide via the internet – of an unarmed and apparently fully subdued black man by a white Transit District police officer. At the same news conference that he announced filing of murder charges against the officer, the District Attorney stated that he "would fight any defense effort to move the case out of Alameda County." (San Francisco Chronicle, January 15, 2009, pp.A-1 and A-12.)

Furthermore, the fact that the publicity reaches a wider audience than was previously the case does not undermine the practical benefits that a change in venue can achieve: no matter how widely disseminated news of an event becomes, there is still a meaningful difference in the way those closest in proximity to an event experience it in comparison to those further removed. (For further on this, see Section II, *infra*.) Accordingly, trial courts across the country are in need of guidance only this Court can provide.

## II. THE ROLE THAT IS PLAYED BY THE SOURCE OF THE BIAS IN ASSESSING THE NEED FOR A VENUE CHANGE IS IN NEED OF CLARIFICATION

### A. Publicity-Based Bias

This court's change of venue jurisprudence was developed largely through cases of high levels of pretrial publicity which were ultimately found to be incompatible with the right to a fair trial. Thus, in a line of notable cases, criminal convictions were reversed where publicity had reached a point which was later described by this court as "an atmosphere that had been utterly corrupted by press coverage." *Murphy v. Florida*, 421 U.S. 794, 798 (1975). See, *e.g.*, *Irwin v. Dowd*, 366 U.S. 717, 725-727 (1961) (publicity of, *inter alia*, defendant's confession to six murders, offer to plead guilty, crimes committed as juvenile, and the like "blanketed" the county); *Rideau v. Louisiana*, 373 U.S. 723, 724 (1963) (repeated broadcasts

of defendant's confession rendered trial nothing more than "a hollow formality" (726-727); (*Estes v. Texas*, 381 U.S. 532, 536, 550 (1965) ("cables and wires were snaked across courtroom floor, three microphones were on the judge's bench and others beamed at the jury box and the counsel table"). *Sheppard v. Maxwell,* 384 U.S. 333, 358 (1966) (trial took place in a "carnival like atmosphere" against a background of extensive and inflammatory publicity).

In the wake of these landmark rulings, trial courts faced with intense barrages of publicity, often national in scale but most acute in the area most affected by the events, have been more prepared to grant requests for change of venue. Thus, in the *Angela Davis* case, the internationally known political activist was accused and ultimately acquitted of providing a gun to Jonathan Jackson, which was used in a shooting in the Marin County Courthouse, killing a judge and paralyzing a prosecutor, the case was transferred to another county for trial. *People v. Davis*, Marin County Superior Court No. 3744 (1971). In the Attica prison cases, defendants were granted a change of venue from rural Wyoming County in upstate New York, the crucial factor being that one in five potential jurors had a connection with the prison or state troopers involved in the retaking of the prison. *People v. Attica Brothers*, 359 N.Y.S. 2d 699, 79 Misc. 2d 492 (Sup. Ct. Erie County, 1973). In the Richard Allen Davis case, the man accused and ultimately convicted of the kidnap and murder of Polly Klaas (the case which led to adoption of

California's three strikes law), received national coverage and was transferred to another county for trial. *People v. Davis*, Santa Rosa County Superior Court No. 21720 (1995).

In the Washington DC sniper case, the trial court observed:

> "that venue should be transferred to a jurisdiction outside the Washington-Richmond corridor, where many citizens lived in fear during the month of October 2002 as a result of the crimes with which the defendant is charged."

*Commonwealth v. Malvo*, Criminal No. 102888, Fairfax Cty. Cir. Ct. (July 2, 2003). In Virginia, the trial court reasoned that moving the trial to a county outside the locus of the crimes, barely 100 miles away, nonetheless provided a jury pool that was not permeated with the fear and personal identification with victimhood that existed in Beltway communities.

In the cases cited above, as in the Oklahoma City bombing trial, the change of venue did not result in obtaining a jury free of any knowledge of the case (in this age of mass communication that would likely be both impossible and undesirable). Rather, the change was designed to prevent the facts of the case from being over-shadowed, if not overwhelmed, by the social and political context unique to the original venue. *United States v. McVeigh*, 918 F. Supp. 1467, 1473 (W.D. Okla. 1996) (the Oklahoma City bombing case).

### B. Community-Attitudes-Based Bias

The present case, on the other hand, although not apparently the subject of the same kind of intense case specific pre-trial publicity that prompted the landmark rulings previously alluded to (p.6, *supra)*, did arise in the context of intense and long enduring anti-Castro sentiment documented in the newspaper articles submitted by the defense. The strong feelings and animosity reflected in such data are understandably the result of the personal experiences of Cuban American refugees, who have become an integral part of the community and the dominant ethic group in Miami-Dade. Unlike most other parts of the country where small populations of refugees have settled in insular communities often described as ethnic ghettos, and whose acceptance into the wider community and the political structure takes generations, the Cuban presence in Miami-Dade has become a dominant one in commerce, politics and daily life, affecting Cuban and non-Cuban residents alike.

Non-Cubans in Miami-Dade have been exposed to far more anti-Castro sentiments than non-Cubans living in other parts of Florida, and certainly in other parts of the United States. Likewise they have also been exposed to an enduring campaign to oust Castro from power, and almost contemporaneously with this trial, the events related to Elian Gonzalez. This atmosphere seems to be the very thing the Court addressed in *Pamplin v. Mason*, 364 F.2d 1, 11 (5th Cir. 1968) when it stated:

> Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

A similar situation arose in a state court case in California, *People v. Croy,* Superior Court, Placer County, No. 52587 (1987), involving a Native American defendant charged with killing a Caucasian police officer, which resulted in a change of venue. There the Court observed:

> This is simply to say, that absent other factors the existence of residual bias does not alone provide sufficient basis for change of venue. What the potential for bias from preconceived notion about Native Americans in Placer County does do, is potentiate the otherwise "low level" factors indicating the need for change of venue . . .

See also, *United States v. Means*, 409 F. Supp. 115 (D.N.D. 1976) (venue changed based on findings indicating strong community prejudice against Native Americans in general and the American Indian Movement in particular).

In the experience of *amicus*, bias based on what the dissent to the 11th Circuit's *en banc* opinion calls "prejudice within the community," or what also might be referred to as "community attitudes" (i.e., attitudes which pre-exist any pertinent adverse publicity), can be at least as incompatible with the right to a fair

trial as bias stemming from case related pre-trial publicity.

And, from the record below, it appears there is reason to be concerned that the widespread hostility toward the Cuban government among residents of Miami-Dade could and did impact jurors. Non-Cuban jurors were likely to be aware that this case would be of significance to the Cuban community in Miami-Dade; that it would be closely followed, especially in the wake of the Elian Gonzalez affair; and that the Cuban community could react to a verdict perceived to be adverse to their interests. In this context, whether or not individual jurors harbored anti-Castro sentiments, they are well aware that the surrounding community did, which causes us to question whether a fair and impartial jury could be impaneled in the Miami-Dade community.

### C. The Fear Factor as a Source of Bias

Any attempt to categorize the sources of bias that come into play in the case law regarding change of venue would be incomplete if consideration were not given to another powerful factor that may accompany publicity-based bias or community attitude based bias in any given case. This is the corrosive effect that fear on the part of jurors can have on the fairness of a trial. And, it includes not only fear for one's physical safety or that of one's family, but fear for one's economic livelihood or even for preserving one's network of social relationships. Whether this phenomenon is

characterized as "fear," or merely "concern," it presents a danger if it reaches a point when a juror feels that he/she would feel uncomfortable around friends, neighbors, colleagues, or others if they knew how he/she voted in regard to guilt.

In our view, the situation that defendants faced on the eve of trial in the present case has many, if not all, of the indicia that have historically prompted fear on the part of jurors. The Elian Gonzalez affair had stoked the flames of resentment on the part of the Miami-Dade community against Castro and his government to the point where demonstrations and mass protests were taking place in the streets.[3] One prospective juror had concerns about community reaction to a verdict because she did not "want rioting and stuff to happen like what happened with the Elian case." (R26 at 938, 945.) Another referred to the "mob mentality" that surrounded the Elian Gonzalez matter. (R27 at 1118-28, 1175-77.)

The climate of fear was palpable. At least one prospective juror admitted to fearing for his physical safety. (R25 at 782, 789.) Another confessed to concern about the impact that sitting on the jury would have for his business, which was dependent on the good will of the community. (R26 at 1059, 1073.) And when during the trial a prominent member of the

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[3] R59 at 6096-108, 6145-49 (protestors carried signs stating "take Castro down" and "spies to be killed." *Id.* at 6145); R26 at 938, 945; R3-397, Exs.; R4-483, Exs.; R4-498, Exs.

exile community who was testifying as a witness referred to a defense lawyer as doing the work of the Castro government (R81 at 8944-45), the jury members that sat on the case had to be concerned about having their own loyalty to the United States questioned if they failed to convict.

Nor was the impact of public demonstrations and protests on the mood of the public confined to the Cuban-American population; the entire community was affected. One non-Cuban prospective juror was concerned about returning a not guilty verdict because he would face "personal criticism" and media coverage and because he had concerns for what might happen after a verdict was returned. (R26 at 1021-28, 1030, 1032.) Another, referring to community sentiment which he said, stoked by publicity, could become quite volatile, stated it would be difficult to follow the court's instruction not to expose oneself to information about the case. (R26 at 1011-13, 1018-19.)

In recognition of the climate of fear that surrounded the trial, the district court tried to insulate jurors from the glare of media scrutiny. But apparently to little or no avail. On the first day of voir dire, after learning that prospective jurors were exposed to a press conference held by the victims' families on the courthouse steps and that some jurors were approached by members of the press, the district court addressed the subject of isolating the jurors (R22 at 111-16; R62 at 6575-76), and instituted protections, including instructing marshals to accompany the jurors as they left the building, sealing the voir dire

questions (R7-078 at 2-3, 7; R21 at 111-113, 117-119; R22 at 115, 119), and limiting the sketching of witnesses for their protection. (R9-1126). When later on in the trial some of the jurors nonetheless indicated they felt pressured, the court again modified the jurors' transportation and entry and exit from the courthouse. But during deliberations jurors were again filmed entering and leaving the courthouse all the way to their cars (R126 at 14643-46) One has to wonder whether at this point the district court recognized the futility of trying to protect the integrity of the trial process without a change of venue.

### D. The Interplay Among Factors as a Source of Bias

A distinctive feature of the instant case is the manner in which various sources of bias (community attitudes, publicity, fear, and miscellaneous other factors) combined to form what the 11th Circuit dissent referred to as a "perfect storm." (Pet. App. 316a.) Thus, charges of committing espionage on behalf of the Cuban government were heard by a jury drawn from a community which had as a dominant value a four decade long history of virulent anti-Castro sentiment. This was a sentiment which, but for the publicity about the BTTR shootdown and Elian Gonzales controversy which continued through the trial, might otherwise have diminished in intensity over time. Instead, publicity appears to have exacerbated the prejudice that was already inherent to this unique situation. If that were not enough, the

toxic atmosphere surrounding the trial gave jurors concern about their physical safety and livelihood. This in turn played into the government's arguments regarding the evils of Cuba and the threats it posed to American values.

This case provides an occasion for this court to affirm the importance for trial courts to afford consideration to all relevant factors, including their interplay with one another, in assessing the need for a change of venue. At least one state Supreme Court employs such a multi-factored approach to motions for venue change.[4]

## III. IT IS ESSENTIAL THAT COURTS RECOGNIZE THE LIMITATIONS OF VOIR DIRE AS A MECHANISM FOR DETECTING JUROR BIAS

A thorough voir dire is often assumed to be the best remedy for bias, if not the best assessment of the nature and extent of prejudice, which may exist in the venire. However, there are inherent limitations to

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[4] The California Supreme Court has identified a number of factors other than publicity which support a presumption that potential jurors are biased. These factors include the nature and gravity of the offense, size of the community, length of time the accused has been in the community, reputation of the victim's family, and notoriety the charged crime would naturally create. See, *Frazier v. Superior Court*, 5 Cal. 3d 287 (1971) (community's esteem for victims and its extreme hostility and mistrust of "hippies" such as the defendant); *Fain v. Superior Court*, 2 Cal. 3d 46 (1969); *Maine v. Superior Court*, 68 Cal. 2d 375 (1969).

what voir dire can achieve as an effective mechanism for rooting out bias. As Chief Justice Marshall observed two centuries ago, protestations of neutrality by a juror are not to be trusted:

> He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him ... He will listen with more favor to that testimony which confirms, than that which would change his opinion.

*United States v. Burr*, 25 Fed. Case 49 (case #14, 692g, 1807). The skepticism with which courts have viewed jurors' self assessments of fairness, particularly in controversial and high publicity cases, is traceable to several dynamics which necessarily come into play in the course of voir dire, as discussed below.

### A. The Problem of Unconscious Bias

In the Oklahoma City bombing trial, Judge Matsch asserted that the existence of prejudice is not easy to prove, in part because "it may go unrecognized in those who are affected by it." *United States v. McVeigh*, *supra*, 918 F. Supp. 1467, 1472. Likewise, Justice Breyer has noted: "'[s]ubtle forms of bias are automatic, unconscious and unintentional' and 'escape notice, even the notice of those enacting the bias.'"[5]

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[5] *Miller-El v. Dretke*, 545 U.S. 231, 286 (2005) (Breyer, J., concurring) (quoting Antony Page, Batson's Blind Spot:

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These statements are consistent with psychological research on jurors and, indeed, on many other cases of human behavior.[6] They are also consistent with recent scholarship and research on the role of unconscious bias in the context of hiring and employment, health, housing, and education, among more.[7] Although Judge Matsch's remarks occurred in the context of the Oklahoma City bombing, they are equally applicable to a trial of Cuban agents in the climate of anti-Castro sentiment in Miami-Dade.

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Unconscious Stereotyping and the Peremptory Challenge, 85 B.U.L. Rev. 155, 161 (2005)).

[6] See Vidmar, Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation, 26 LAW AND HUMAN BEHAVIOR 73 (2002); Nesbitt and Wilson, Telling More Than We Can Know: Verbal Reports on Mental Process, 84 PSYCHOLOGICAL REVIEW 231 (1977).

[7] See, e.g. Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination And Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999); Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, The Ego and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175 (2008); Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002) (giving an overview of new research in cognitive social psychology).

### B. The Problem of Socially Desirable Responses

Some prospective jurors who hold biases are likely to state that they can be impartial solely because their answer is consistent with socially learned values that people should be impartial, a phenomenon that psychologists call "acquiescence" or "socially desirable" responses. The tendency to provide such answers can be enhanced by the authority presence of the judge and is heightened when the voir dire examination is conducted by the Court.[8] Jurors perceive the authority of the Court and implicit message that to be "good" citizens they must say they can set aside their biases and prejudices, without knowing whether they are truly capable of doing so, and follow the law. Unfortunately such blanket assertions are often naive and hollow.

### C. The Problem of Normative Pressures

Judge Matsch's observations in the Oklahoma City bombing trial are instructive in more than one respect. He also said that the existence of prejudice "has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative behavior." *United States v. McVeigh*, *supra*, 918 F. Supp. at 1473. Social science research on the

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[8] Jones, S., *Judges-versus Attorney-Conducted Voir Dire: An Empirical Investigation on Juror Candor*, 11 Law & Hum. Behav. 131, 143 (1987).

psychology of jurors also confirms this aspect of legal reasoning.

Jurors do not approach the trial as empty receptacles who passively listen to the evidence and decide cases independently of their past experience, knowledge and awareness of community norms. Numerous studies have shown that jurors draw upon their prior understandings of the world as they evaluate and make sense of the evidence presented at trial.[9] They do not simply store and record evidence. Rather, they actively select and organize it around pre-existing social schemas to construct "stories" about the events in dispute. They fill in gaps in the evidence with inferences about how the world works. These processes include assumptions about important past events, inferences about human character, and the motivations of the parties involved.

Research evidence suggests that events that cause strong emotions[10] or threaten people's cultural

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[9] See, e.g., Pennington and Hastie, explaining the Evidence: Tests of the Story Model for Juror Decision Making, 62 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 189 (1982); Holstein, Juror's Interpretation and Jury Decision Making, 9 LAW AND HUMAN BEHAVIOR 83 (1985); Casper et al., Juror Decision Making, Attitudes and Hindsight Bias, 13 LAW AND HUMAN BEHAVIOR 291 (1989); Smith and Studebaker, What Do You Expect?: The Effect of People's Knowledge of Crime Categories on Fact Finding, 20 LAW AND HUMAN BEHAVIOR 517 (1996).

[10] See, e.g., Fishfader et al., Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention and

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world view affect the way these schemas operate.[11] The sources of this knowledge, information and attitudes may come from pre-existing dispositions, from mass media, or from other persons in the juror's social environment through means of gossip and rumor.[12] In ordinary cases the gossip and rumor may be absent, but in high-profile cases, members of the community frequently discuss the events and make normative statements about their meaning and about the proper outcome of the trial.

This dynamic has, of course, particular applicability to the climate of anti-Castro government bias

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Level of Emotionality, 20 LAW AND HUMAN BEHAVIOR 565 (1966); Kramer et al., Pretrial Publicity, Judicial Remedies and Jury Bias 14 LAW AND HUMAN BEHAVIOR 409 (1990); Ogloff and Vidmar, The Impact of Pretrial Publicity on Jurors: A Study to Compare the Effects of Television and Print Media in a Child Sex Abuse Case, 18 LAW AND HUMAN BEHAVIOR 507 (1994).

[11] See, e.g., Greenberg et al., Terror Management Theory of Self Esteem and Cultural World Views: Empirical Assessments and Conceptual Refinements, in Mark Zanna, Ed., ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, Vol. 29, 61 (1997); Greenberg et al., Evidence for Terror Management Theory II: The Effects of Mortality Salience on Those Who Threaten or Bolster the Cultural World View, 58 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 308 (1990); Miller et al., Accounting for Evil and Cruelty: Is it to Explain or Condone?, 3 PERSONALITY AND SOCIAL PSYCHOLOGY REVIEW 254 (1999).

[12] See Vidmar, Retributive Justice: Its Social Contest, in Michael Ross and Dale T. Miller, Eds., THE JUSTICE MOTIVE IN EVERYDAY LIFE (2001).

that permeated the Miami-Dade community in the wake of the Elian Gonzalez affair. That such a climate was the normative view in the community at that time and place seems incontestable. And to expect that this climate did not invade the jury room during deliberations on the fate of persons accused of acting as Cuban espionage agents is to stretch the limit of one's imagination.

### D. The General Problem of the Unreliability of Jurors' Voir Dire Responses

Limitations on the reliability of voir dire as a mechanism for assessing bias in jurors are not always traceable to specific phenomena such as unconscious bias, socially-desirable responses, or normative pressures. In a recent article Judge Gregory Mize described research on jurors in felony trials who had been asked up to eighteen questions during voir dire.[13] Then, in a separate room he informally interviewed jurors who had heard the questions but had not responded to them during group voir dire. While some didn't understand the questions and others were just resentful at being called for jury duty, still others revealed biases strongly favorable to the defense or prosecution. Thus, the jurors' responses to earlier voir dire questioning were clearly unreliable.

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[13] Mize, On Better Jury Selection: Spotting Unfavorable Jurors Before They Enter The Jury Room, 36 COURT REVIEW 10 (1999).

Judge Mize's findings in this regard are consistent with a considerable body of other research on voir dire.[14]

In short, social science research confirms what many judges have long suspected: for various reasons, voir dire is an inherently imperfect device for detecting bias on the part of jurors. In the experience of *amicus*, this is particularly true in high profile

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[14] See, e.g., Edward Bronson, THE EFFECTIVENESS OF VOIR DIRE IN DISCOVERING PREJUDICE IN HIGH PUBLICITY CASES: AN ARCHIVAL STUDY OF THE MINIMIZATION EFFECT (1989); Broeder, Voir Dire Examinations: An empirical Study, 38 Southern Law Review 503 (1965); Kerr et al., On the Effectiveness of Voir Dire in Criminal Cases With Prejudicial Pre-trial Publicity: An Empirical Study 40 AMERICAN UNIVERSITY LAW REVIEW 665 (1991); Kramer et al., Pre-trial Publicity Judicial Remedies and Jury Bias, 14 LAW AND HUMAN BEHAVIOR 409 (1990); Marshall and Smith, The Effects of Demand Characteristics, Evaluation Anxiety and Expectancy on Juror Honesty During Voir Dire, 120 THE JOURNAL OF PSYCHOLOGY 205 (1986); Seltzer, et al., Juror Honesty During the Voir Dire, 19 JOURNAL OF CRIMINAL JUSTICE 451 (1991); Horowitz, Juror Selection: A Comparison of Two methods in Several Criminal Cases, 10 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 86 (1980); Diamond, Scientific Jury Selection: What Social Scientists Know and Do Not Know, 73 JUDICATURE 178 (1990); Zeisel and Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 STANFORD LAW REVIEW 491(1978); Neil Kressel and Dorit Kressel, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING (2002); Moran et al., Jury Selection in Major Controlled Substance Trials: The Need For Extended Voir Dire, 3 FORENSIC REPORTS 331 (1990); MICHAEL SAKS AND REID HASTIE, SOCIAL PSYCHOLOGY IN COURT, 66-71 (1978).

cases where the impartiality of the local jury pool has been called into question. For this reason, *amicus* is skeptical, despite the extensive voir dire conducted by the District Court in this case, that it was possible for defendants who were on trial for being Cuban spies to receive a fair trial in the Miami-Dade community.

## CONCLUSION

For the foregoing reasons, *certiorari* should be granted.

Respectfully submitted,

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